IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-873

SHEARN MOODY, JR., and
JOHN S. BLEKER,

Petitioners,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners, Shearn Moody, Jr. and John S. Bleker, respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas[1] affirming the judgment of the Texas

[1]The Texas Supreme Court refused to review the present action by refusing the Petitioners' timely Application For Writ of Error with a notation of no-reversible error. Accordingly, this Petition is properly directed to the Court of Civil Appeals, rather than the Texas Supreme Court. *Michigan-Wisconsin Pipe Line Co. v. Calvert, Comptroller of Public Accounts, 347 U.S. 157 (1954); Lone Star Gas Co. v. Texas,* 304 U.S. 224 (1938).

Ancillary Receivership Court granting the Ancillary Receiver of Empire Life Insurance Company of America ("Empire") the authority to consummate the Treaty of Assumption and Bulk Reinsurance proposed by Protective Life Insurance Company ("Protective") with regard to Empire.[2]

Petitioner Moody has previously filed a Petition For Writ of Certiorari to the Supreme Court of the State of Alabama attacking that Court's affirmation of the Domiciliary Receivership Court's Order authorizing the Domiciliary Receiver of Empire to execute the Treaty of Assumption and Bulk Reinsurance. See, *Shearn Moody, Jr., vs. State of Alabama, ex. rel. Charles H. Payne*, ... U.S. .... (No. 77-428, docketed September 16, 1977). Petitioner Moody respectfully submits that the present action pertaining to the ancillary receivership should also be considered with the aforesaid action pertaining to the domiciliary receivership of Empire.

This case involves important questions as to the constitutional propriety of the approval of a Treaty of Assumption and Bulk Reinsurance which arbitrarily discriminates between policyholders, stockholders and creditors who are similarly situated and accordingly denies them the equal protection of the laws guaranteed by the Fourteenth Amendment, and the constitutional propriety of an Ancillary Receivership Court's approval of a Treaty of Assumption and Bulk Reinsurance in a proceeding where the ancillary receivership was instituted in total defiance of estab-

[2]Defendants' Exhibit 49 reveals that the Executive Vice President of Protective made private ex parte promises to the insurance commissioners of Arkansas, Nebraska, North Dakota, and Montana at a meeting in Las Vegas to induce them to sign a joint resolution recommending Protective. Paul Carr, the court appointed adviser to the Domiciliary Receivership Court, was a party to and participated in these ex parte discussions.

lished statutory procedure and where the policyholders, stockholders and creditors situated in the ancillary jurisdiction were denied notice and an opportunity to appear at a fair, unbiased[3] hearing at which to raise objections to the Reinsurance Agreement contrary to the due process clause of the Fourteenth Amendment. The total defiance of established statutory procedure exhibited by the Commissioner of Insurance and the Attorney General of the State of Texas in pushing through the creation of an ancillary receivership and the clandestine manner in which the Texas Ancillary Receiver sought to have the Reinsurance Agreement approved are totally incredulous in light of the undisputed fact that a majority of Empire's policyholders and assets are located within the State of Texas. Indeed, the Supreme Court of the State of Alabama, the state of the domiciliary receivership, expressly acknowledged this fact and in light thereof gave undue emphasis to the opinion of the Texas Court of Civil Appeals below in passing upon the Reinsurance Treaty, See, *Moody v. State of Alabama*, 344 So.2d 160 (1977).

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of the State of Texas affirming the Ancillary Receivership court's judgment authorizing the Ancillary Receiver of Empire to consummate the Treaty of Assumption and Bulk Reinsurance is reported at 538 S.W.2d 158 (Tex. Civ. App. — Waco, 1976) and appears in the Appendix at

[3]"The opportunity to be heard has been required to be adequate, fair, full, or reasonable. The hearing or defense must be before a competent as well as before a just, equitable and fair and impartial court or tribunal, full and complete, or on the merits and before trial and judgment or decree. Such hearing has been required to be fair, fair and impartial, full and fair." 16A C.J.S. *Constitutional Law* §569(4) (1956).

page A-1. The judgment of the Court of Civil Appeals appears in the Appendix at Page A-6. The order of the Court of Civil Appeal's overruling of the Petitioners' timely Motion for Rehearing appears in the Appendix at page A-7.

The order of the Texas Supreme Court refusing the Petitioners' timely Application for a Writ of Error, with a notation of no-reversible error, appears in the Appendix at page A-9. The order of the Texas Supreme Court overruling the Petitioners' timely Application for a Rehearing of the refusal of the Application for Writ of Error appears in the Appendix at page A-10.

JURISDICTION

The Court of Civil Appeals affirmed the judgment of the Ancillary receivership court on May 13, 1976, and overruled Petitioners' timely Motion for Rehearing on June 10, 1976.

The Texas Supreme Court refused the Petitioners' timely Application for Writ of Error with a notation of no-reversible error on June 22, 1977. The Texas Supreme Court overruled the Petitioners' timely Application for Rehearing on July 20, 1977. The Petitioners presented a joint Motion for Extension of Time in which to file a Petition for Writ of Certiorari to the Honorable Justice Lewis F. Powell, Jr., who signed an order on October 14, 1977 extending their time within which to petition for certiorari to and including December 16, 1977. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3) (1970).

QUESTIONS PRESENTED

1. Whether the Petitioners have been denied the right of due process in that the receivership court deprived them of a just, equitable, fair and impartial hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the trial court was without jurisdiction to hear and decide the case in that it gave full, faith and credit to an Alabama judgment which was based upon an unconstitutional Alabama statute.

   A. Whether the subject Alabama state court interlocutory decree to which the trial court improperly gave full, faith and credit, was based upon an unconstitutional Alabama statute which gave unlimited and arbitrary discretion to the Alabama Insurance Commissioner to value the subject Empire Life Insurance Company asset at any value to be determined by him.

   B. Whether the application and enforcement of section 745(13) by the Alabama state court deprived Petitioners of substantial contractual and property rights in violation of due process, and, the improper granting of full, faith and credit by the trial court further compounded Petitioners' denial of due process.

3. Whether the failure of the Texas Ancillary Receivership Court to provide the policyholders, stockholders and creditors of Empire within its jursidiction with notice of the Ancillary Receiver's Petition for Authority to Consummate the Treaty of Assumption and Bulk Reinsurance, of the hearing thereon, and an opportunity to be heard at said hearing deprived them of their property without due process of law contrary to the Fourteenth Amendment.

4. Whether the Treaty of Assumption and Bulk Reinsurance denied the policyholders, stockholders and creditors of Empire the equal protection of the laws guaranteed by the Fourteenth Amendment by treating differently those policyholders, stockholders and creditors who were similarly situated and by failing

to treat those who were differently situated in a manner consistent with their respective rights.

5. Whether the Court of Civil Appeals denied the Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment when it held that the Ancillary Receivership Court had jurisdiction to approve the Reinsurance Agreement even though the suit below was initiated without the direction, authorization or approval of the Texas State Board of Insurance as required by Section Thirteen of Article 21.28 of the Texas Insurance Code.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I §10 of the United States Constitution:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION

ARTICLE II

§1. Division of powers; three separate departments; exercise of power properly attached to other departments

Section 1. The powers of the Government of the State of

Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

STATUTORY PROVISIONS INVOLVED

ALABAMA INSURANCE CODE TITLE 28A §237:

LIFE INSURANCE, ANNUITIES AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION.—

(1) no person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

ALABAMA INSURANCE CODE TITLE 28A §745:

"ASSETS" DEFINED. In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:

(13) other assets, not inconsistent with the provisions of this section, deemed by the Commissioner to be available for the payment of losses and claims, at values to be determined by him.

TEXAS INSURANCE CODE
ARTICLE 21.21 §4:

UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED. — THE FOLLOWING ARE DEFINED AS UNFAIR METHODS OR COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN THE BUSINESS OF INSURANCE: . . .
(7) UNFAIR DISCRIMINATION

(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other terms and conditions of such contract . . .

TEXAS INSURANCE CODE
ARTICLE 21.21-A

No insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and of equal expectation of life in the amount of the payment of premiums or rates charged for policies of life or endowment insurance or dividends or other benefits payable thereon: . . .

TEXAS INSURANCE CODE
ARTICLE 21.28 §13:

Sec. 13. Ancillary Delinquency Proceedings. When ever under the laws of this State, a receiver is to be appointed in delinquency proceedings for an insurer domiciliary in another state, a court of competent jurisdiction in this State shall, on the petition of the Board of Insurance Commissioners of this State, appoint

the liquidator herein provided as ancillary receiver in this State of such insurer. The Board shall file such petition (a) if it finds that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or (b) if ten (10) or more persons resident in this State, having claims against such insurer, file a petition or petitions in writing with the Board, requesting the appointment of such ancillary receiver. Such ancillary receiver shall have the right to sue for and reduce to possession the assets of such insurer in this State, and shall have the same powers and be subject to the same duties with respect to such assets, as are possessed by a receiver of a domiciliary insurer under the laws of this State. The remaining provisions of this Article shall be applicable to the conduct of such ancillary proceedings.

STATEMENT OF THE CASE

The parties to this proceeding were Shearn Moody, Jr., ("Moody"), the principal shareholder, a creditor, president and chairman of the Board of Empire Life Insurance Company ("Empire"), an Alabama domiciliary insurance company placed in receivership in Alabama and Texas; John S. Bleker, an intervenor, shareholder and policyholder of Empire; Protective Life Insurance Company, ("Protective"), an intervenor and the reinsurer of Empire; and Herbert Crook, statutory insurance liquidator of the State of Texas and Ancillary Receiver of Empire.

Empire was incorporated in Alabama in June, 1963. In July 1963, Petitioner Moody assigned to Empire two/fifths (2/5ths) of his one/eighth (1/8th) life estate interest in the income from a trust created under the Will of Libbie Shearn Moody (hereinafter "the Trust Interest"). In 1964 a value of $5,813.440

for the Trust Interest was approved by the Alabama Insurance Department. In 1965 the value of the said trust interest was increased to $14,213,440 by Empire and the National Association of Insurance Commissioners' ("NAIC") zone examination of Empire. Examiners from the insurance departments of Alabama, Arkansas and Texas approved the increased valuation to $13,528,000.

From 1964 to 1968 Empire, with its principal asset being said trust interest, acquired by merger or acquisition the assets and insurance business of the following companies: Consolidated American Life Insurance Co., Chicago, Illinois (1964); Empire Life Insurance Company of America, Little Rock, Arkansas (1965); National Empire Life Insurance Co., Dallas, Texas (1966); Reliance Life Insurance Co., Dallas, Texas (1968); American Trust Life Insurance Co., Wichita Falls, Texas (1968); and Republic Life Insurance Co., Moline, Illinois (1968). All of these mergers and acquisitions were approved by the insurance departments of the aforementioned states, and predicated on the value of the trust interest of over thirteen and a half million dollars.

In 1968, the Texas Insurance Commissioner questioned whether *any* value could be given Empire's interest in the trust, but after a public hearing by the Texas Insurance Commissioner, Empire's reinsurance of American Trust Life Insurance Company was approved and Empire was found to be solvent (Defendants' Exhibit 13). This finding was predicated upon the aforementioned 1965 valuation of Empire's interest in the Libbie Shearn Moody Trust because Empire would not otherwise have been solvent.

During 1969 and 1970, the Insurance Department of Alabama conducted an examination of Empire and in June of 1969 the Honorable Frank Ussery, the then Alabama Insurance Superintendent, directed that Empire's interest in the Libbie Shearn Moody Trust be valued at $14,213,440 less a reserve of $1,292,130, to be increased annually by $430,710 (Defendants' Exhibit 30). In 1971, the Honorable John G. Bookout succeeded Mr. Ussery as Insurance Superintendent for Alabama, and suddenly, without justification directed that Empire's interest in the trust be devalued to $4,250,000. This sudden politically motivated devaluation by almost $10 million dollars rendered Empire insolvent and impaired under statutory insurance accounting principals, and deprived Moody of a large part of his inheritance which he had given to Empire to capitalize said company and for which he has received no economic benefit.

On April 5, 1972, the Texas Insurance Commissioner entered an Order of Supervision with respect to Empire in Texas. (Order No. 36707). However, on June 7, 1972, by Commissioner's Order No. 37251, the Commissioner of Insurance did not appoint a conservator under Article 21.28-A of the Texas Insurance Code, Empire having represented that it would interpose no delay concerning its rehabilitation in the receivership proceedings to be initiated against it in Alabama. Indeed, Empire's officials were assured by Bookout in Alabama that the receivership would simply provide Empire with an opportunity to get back on its feet after the staggering blow caused by the devaluation of the trust interest. The Texas State Board of Insurance took no official action concerning Empire at all

(S.F.[4] 266-272). On April 17, 1972, the then Alabama Commissioner of Insurance John G. Bookout instituted receivership proceedings against Empire in Alabama.

On June 23, 1972, the State of Texas, by and through the Attorney General of the State of Texas, "at the instance and the request of the Commissioner of Insurance of the State of Texas" filed its original Petition in the 53rd Judicial District Court of Travis County, Texas,[5] against Empire, asking that after a hearing a permanent receiver be appointed to take possession of the affairs of Empire pursuant to Article 21.28 of the Texas Insurance Code and pursuant to Subsection (a) of Section 12 of Article 21.49-1 of the Texas Insurance Code. The petition alleged that Empire, a company domiciled in Alabama, had been placed in receivership in Alabama and asked that "the receivership prayed for herein should be made ancillary to such Alabama receivership in accordance with Section 13 of Article 21.28 of the Texas Insurance Code". On July 11, 1972 the Texas court appointed a temporary ancillary receiver for Empire.

On June 29, 1972, the Alabama Court issued a Decree appointing John G. Bookout as Domiciliary Receiver for

[4]The notation "S.F." refers to the Statement of Facts in the record below. The Statement of Facts is a transcript of the testimony and exhibits introduced in the trial court below.

[5]According to a report prepared by the State Board of Insurance entitled "Insurance Companies and Affiliates in Texas in Receivership" and presented to the Governor of Texas, the 53rd Judicial District Court of Texas of Travis County received over 70% of the insurance receivership cases filed in Travis County District Courts in 1972. The 53rd received 31; the 200th had 1; the 126th had 8; the 167th had 3; the 147th had 1; the 149th had 0; the 201st had 0; and the 98th had 0. This was an unfair distribution of receiverships involving life insurance companies and their affiliates among the District Courts of Travis County in violation of the due process provisions of the Fourteenth Amendment.

Empire, and on June 14, 1974, the Alabama Court entered a decree finding, with respect to that proceeding, that Empire was insolvent and authorizing the Domiciliary Receiver to consummate a reinsurance agreement between Empire and Protective, to proceed with the liquidation of Empire, and to "proceed under this Order subject to the further review by and of this Court".

Pursuant to the Treaty of Reinsurance approved in Alabama a two million dollar slush fund was set up to finance, among other things, the prosecution of a corporate mismanagement suit against Moody predicated on Empire's losses which resulted from the precipitous Alabama devaluation of the value of the trust interest by almost ten million dollars overnight after it had been carried at over fourteen million dollars for over seven years and although said value had been approved by the insurance commissioners of at least six states, including Alabama and Texas, countless times.

In November of 1974, the State of Texas moved for summary judgment on its application for the appointment of a permanent ancillary receiver for Empire in Texas. The motion was based entirely upon the Alabama Court's decree of June 14, 1974. Shortly thereafter Herbert Crook, the Temporary Ancillary receiver moved for authority to consummate the Reinsurance Agreement. Petitioner Moody filed an Opposition to the Motion For Summary Judgment (p.A-11) and filed various affidavits in support thereof, including the affidavit of Dr. Joseph Trosper, who had prepared an evaluation of the two/fifths (2/5ths) of the one/eighth (1/8th) life estate interest in the Libbie Shearn Moody Trust.

In his Opposition, Petitioner Moody pointed out that "since most of the assets of Empire [were] located in Texas, [the

Texas] Court ha[d] a special obligation to Texas policyholders and Texas creditors to insure that whatever arrangements made [were] in the best interest of those policyholders and creditors. [U]nder the Order of the Alabama Court, all of the assets of Empire, primarily located in Texas, [were to] be lumped together, and treated as one, without any provisions for the protection of Texas policyholders and stockholders in relation to those assets." (p.A-15).[6]

The Petitioner Moody attacked any summary approval by the Ancillary Receivership Court of the reinsurance agreement approved by the Alabama Domiciliary Receivership Court, and indicated that no time had yet been set for the filing of claims against Empire. Petitioner Moody asserted the following:

> Under Section 3(a) of Article 21.28 of the Texas Insurance Code, filing of such claims shall be within the period of time as 'specified by the Court'. However, the Court, at this time, has not specified any time for the filing of such claims. The time for filing of such claims, as a matter of due process, must be prior to any determination concerning the disposition of assets by reinsurance of Empire. This is the only manner in which Texas Policyholders and creditors are given notice of the proposed disposition of assets and reinsurance agreement, and the only manner in which they may be heard on such issues and object to such proposal if they so desire. *Without such notice to Texas policyholders and other creditors, Texas policyholders and creditors would be constitutionally denied due process.* [Emphasis added]

[6]On or about April 4, 1974, Harry L. Edwards, President of National Western Life Insurance Company forwarded a proposal to the Alabama and Texas receivers whereby Empire's assets would be kept separate from its own assets and a moratorium on the cash benefits available under the reinsured policies would be 30% whereas Protective's Plan provided for the commingling of assets and an initial moratorium of 35%, which moratorium was later increased to 50%.

> *The Fourteenth Amendment of the United States Constitution requires that policyholders and creditors must be given prior notice and a hearing before assets in which they have an interest are sold.* [Emphasis added]

This is especially true in light of the following:

1. Under the terms of the said reinsurance agreement, Protective Life Insurance Company of America does not assume all the liabilities of Empire Life Insurance Company of America to its policyholders, but only a portion thereof. The reinsurance agreement provides for the transfer to Protective Life Insurance Company except $2,000,000. Accordingly, a policyholder who does not consent to reinsurance upon the terms stated in the reinsurance agreement, would be left with nothing more than an unsecured claim against Empire Life Insurance Company of America, to share with other creditors in its assets after payment of all of administration expenses.

2. All the Empire Life Insurance Company of America assets are to be lumped together and transferred outside of Texas.

3. Under the present reinsurance agreement, Empire Life Insurance Company of America assets are to be transferred to Protective Life Insurance Company when the June 14, 1974 Order is final, regardless of the fact that problems may arise later with the order or with the agreement.

Because no such notice has been given to the policyholders and other creditors as a matter of statutory and constitutional law, Plaintiffs are not entitled to Summary Judgment on the application before this Court. [p.A.17-19]

The Petitioner Moody also attacked the Reinsurance Agreement as being contrary to Alabama and Texas law because "such agreement prefers policyholders over creditors," (p.A-20).

On November 15, 1974, the Ancillary Receivership Court

granted the Motion for Summary Judgment filed by the State of Texas and appointed Herbert Crook the statutory liquidator for the Texas State Board of Insurance, permanent ancillary receiver for Empire. The court decreed that the rights of all parties interested in the proceeding were to be fixed as of June 14, 1974, the date of the Alabama decree. The court refused summarily to grant the Ancillary Receiver the authority to consummate the Reinsurance Agreement and set the matter for trial.

On or about January of 1975 Petitioner Bleker, a stockholder and policyholder of Empire was granted permission to intervene and filed a Plea in Intervention pointing out that as a policyholder of Empire he had no notice of the ancillary receiver's appointment, that the Reinsurance Agreement was unacceptable because it reduced the cash value of his policy and subjected his policy to a 35% moratorium, that he had no notice of his rights, that he had no opportunity to object to the adequacy of the two million dollar fund to pay rejecting policyholders and that in light of the foregoing he had been denied his right to due process guaranteed by the Fourteenth Amendment. He requested that no approval of the Reinsurance Treaty be had until all policyholders were notified and given an opportunity to appear.

In February of 1975 Bleker filed a motion for order vacating the appointment of ancillary receiver. In the Motion, Petitioner Bleker pointed out that the ancillary receivership court lacked jurisdiction to proceed since Article 21.28 Section 13 of The Texas Insurance Code had not been complied with, that the policyholders received no notice of the appointment of the permanent ancillary receiver in violation of their right to due process

and that the reinsurance of Empire would deprive policyholders of their right to the equal protection of the laws guaranteed by the U.S. Constitution. Petitioner Moody also filed a motion to vacate the appointment of the ancillary receiver and also attacked the jurisdiction of the trial court since Article 21.28 Section 13 had not been complied with; ie, the statute required the State Board of Insurance to institute the proceeding and *not* the Attorney General at the instance and request of the Commissioner of Insurance.

In mid-February of 1975, the Texas Ancillary Receivership Court conducted a nonjury trial on the Ancillary Receiver's Request for authority to consummate the Reinsurance Agreement, but failed to provide the policyholders, stockholders and creditors of Empire situated within the State of Texas, with notice of the hearing. During said trial, Petitioners Moody and Bleker attacked the finding of Empire's insolvency predicated on the Alabama receivership court's decree, the jurisdiction of the court to proceed because of non-compliance with Article 21.28,Section 13 and the unlawful and discriminatory impact of the reinsurance agreement upon Empire's policyholders, stockholders and creditors. On February 26, 1975, the Ancillary Receivership Court granted the Ancillary Receiver the authority to consummate the reinsurance agreement.

Petitioners Moody and Bleker appealed the Ancillary Receivership Court's Order of February 26, 1975, to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, which cause was transferred to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas and affirmed by that Court on May 13, 1976. The Texas

Supreme Court refused Petitioners' timely Application for Writ of Error with a notation of no-reversible error on June 22, 1977. Petitioners' timely Application for Rehearing filed in the Texas Supreme Court was overruled on July 20, 1977.

In both the Court of Civil Appeals and in the Texas Supreme Court, the Petitioners assigned as error the Ancillary Receivership Court's approval of the Reinsurance Agreement on the grounds that it unlawfully discriminated among Empire's policyholders, stockholders and creditors. The Petitioners also assigned as error the finding of insolvency predicated on the Alabama court's decree, and assigned as a denial of the due process of law guaranteed by the Fourteenth Amendment, the Ancillary Receivership Court's failure to provide the policyholders, stockholders and creditors of Empire situated within the State of Texas with notice of its hearing upon the Ancillary Receiver's application for authority to consummate the Reinsurance Agreement.

Finally, the Petitioners also assigned as serror and attacked the jurisdiction of the Ancillary Receivership Court to approve the Reinsurance Agreement since the suit was initiated by the State of Texas without the authorization or approval of the Texas State Board of Insurance as required by Section 13 of Article 21.28 of the Texas Insurance Code.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS HAVE BEEN DENIED THE RIGHT OF DUE PROCESS IN THAT THE RECEIVERSHIP COURT DEPRIVED THEM OF A JUST, EQUITABLE, FAIR, AND

IMPARTIAL HEARING IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In addition to being denied the right of notice of hearing, and the very important concomitant right to be heard, the petitioners were deprived of a just, equitable, fair, and impartial hearing on the merits. Such a right is elementary and has been described in *Corpus Juris Secundum* as follows:

> The opportunity to be heard has been required to be adequate, fair, full, or reasonable. The hearing or defense must be before a competent as well as before a just, equitable and *fair* and *impartial* court or tribunal, *full and complete*, or *on the merits*, and before trial or judgment or decree. Such a hearing has been required to be *fair, fair and impartial, full and fair.* (Emphasis added. 16A *C.J.S. Constitutional Law* §569(4)(1956).

Furthermore, a fair, impartial, and *independent* judiciary has been uniformly held to be indispensable to justice in our society. Canons 1, 2 and 3 of the American Bar Association Code of Judicial Conduct are pertinent to the case at bench. Canon 1 provides in pertinent part as follows:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself observe high standards of conduct so that the conduct of integrity and *independence* of the judiciary may be preserved . . .

Furthermore, Canon 2 provides in pertinent part as follows:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary.

> B. A judge should not allow his family, social, or *other relationships* to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the *impression that they are in a special position to influence him.*

Each of the above mentioned Canons of Judicial Conduct and the fundamental rights of procedural due process, including the right to receive an equitable, fair, and *impartial* hearing, was violated by the Ancillary Receivership Court. Furthermore, the Ancillary Receivership Court violated the constitutional principal of separation of powers, as enunciated in Article 2, Sec. 1 of the Texas Constitution, by allowing the State Liquidator and Receiver of the Executive Branch of State Government full and complete authority to control and determine the state court proceedings and to dictate the judgment and decision of the Receivership Court.

Clear evidence of these violations of due process and canons of judicial conduct is found in the statement in open court by Judge Herman Jones, Texas Ancillary Receivership Judge, on April 5, 1973, wherein he stated as follows:

> "But a Court who appoints a receiver gets a lot of confidence out of the fact that his receiver has asserted a claim, and I want to keep it that way. It seems to me what I am saying ought to be pretty clear to anybody. I have the highest respect for the present attorney general, every attorney general that has been here since I have been here, but it is not the Attorney General of Texas to whom this Court looks for the preservation of its receivership estate. It is to its receiver that it looks. And it ought to be able to say, *if the claim is worth anything, my receiver will assert*

> *it, and that is the relationship I want,* and I have labored this far beyond what I intended to when I mentioned it. But I think the relationship between the Court and its receiver — this Court is totally — and everybody from the receivership's offices knows it — *this court is totally helpless to know the details or even, I guess, the general outline of most of the matters* that are presented to me by the receiver, and I will say very frankly I put my name on things — they know this better than I: *I put my name on things that I am not fully conversant with, and I do it because the receivership of this court has recommended it, and I am going to continue to do that, because I have confidence in the receiver and his staff. . . . that is my view of the function of the receiver and the relationship that should exist between the receiver and the court* which appoints him. Of course, the court appoints him because he is the liquidator and is under the statute required to appoint him. (Emphasis added). (T. p. 479, 480, 481)

Such a statement is conclusive evidence of the judge's direct violation of petitioner's fundamental right of due process as described above. Rather than receiving an impartial hearing on the merits in an adversary proceeding, petitioner was helpless to exercise his fundamental constitutional rights of due process. The trial court ratified, authorized, and confirmed any and all pertinent demands and requests of the Receiver. He did so under the misconception that he served as a statutory "rubber-stamp" of the state agency, in clear and direct violation of the constitutional protectives of due process and separation of powers.

It is the *substance* and not the mere form of judicial proceedings which must be weighed in the exercise of procedural due process. If a litigant is provided a courtroom, and judge,

but is denied the opportunity of an "impartial" hearing on the "merits" he has been denied procedural due process. A Judge's courtroom statement that he signs documents for the adversary party, without knowledge or understanding of contents or effects of the documents solely because of the adversary's recommendation, is a clear abuse of judicial discretion. A more blatant denial of a "fair and impartial hearing on the merits" is difficult to imagine.

This judicial conduct permeated the entire judicial proceeding, including the Receiver's Motion for Summary Judgment on the issue of Empire Life Insurance Company's "insolvency", which ultimately resulted in the Receivership Court's approval of the subject "reinsurance agreement". Stated more simply, the court first "rubber-stamped" the Receiver's Motion for Summary Judgment and thereby deprived petitioners of the right of a fair and impartial trial of the important factual issues. After summarily deciding in 1975 that Empire Life Insurance Company was insolvent ". . . because the receivership of this court has recommended it," (T. p. 480), the court proceeded in early 1976 to approve a "reinsurance agreement" between another receiver (Alabama) and Protective Life Insurance Company. Although the subject agreement disposed of the substantial assets of the petitioners, and further, destroyed, impaired, or otherwise effected petitioners' vested contractual rights, the court failed to give *notice* of the hearing in which he approved the agreement, apparently "because, the receiver recommended it" and ". . . because I have confidence in the receiver and his staff." (T. ibid). Such judicial conduct is the very reason for the procedural safeguards of due process.

II.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO HEAR AND DECIDE THE CASE IN THAT IT GAVE FULL FAITH AND CREDIT TO AN ALABAMA JUDGMENT WHICH WAS BASED UPON AN UNCONSTITUTIONAL ALABAMA STATUTE.

The issue of jurisdiction was raised early by the petitioners' in their motions to vacate the appointment of a permanent ancillary receiver and in Petitioner Moody's Opposition to Motion for Summary Judgment. Furthermore, petitioners' objection to the trial court's exercise of full faith and credit was raised in the trial court (S.F. 70-71) and on appeal and is more particularly described in petitioners' Appellate Brief in The Court of Civil Appeals and their Application for Writ of Error to the Supreme Court of Texas.

The improper and unlawful application of the doctrine of full faith and credit and comity by and between the states of Alabama and Texas merely compounded the substantial deprivation of constitutional rights suffered by the petitioners. For example, when called upon to decide the important issue of "insolvency" which was improperly and summarily determined by the trial court based upon full faith and credit given to an Alabama state court judgment, the Texas Supreme Court cited the Alabama Supreme Court decision which cited the Texas Civil Court of Appeal decision and all gave full faith and credit to each and the other.

In addition, the Texas trial and appellate courts were improper in denying petitioners the right to challenge the jurisdiction of the Alabama state court and to challenge the decision

of the Alabama state court on constitutional and extrinsic fraud grounds. Instead, the Texas courts improperly gave full faith and credit to an interlocutory Alabama state court decree, which was itself based upon an unconstitutional statute. (See Point II, *infra*). All of this occurred, despite the fact that substantially all of the assets of Empire Life Insurance Company and a majority of its shareholders and policyholders were all located in the state of Texas. Despite important contrary constitutional and legal principals, the effect of the Alabama state court interlocutory decree was to deprive each of the Texas shareholders, creditors, and policyholders of Empire Life Insurance Company of vested contractual rights and substantial assets located within the state of Texas.

A. THE SUBJECT ALABAMA STATE COURT INTERLOCUTORY DECREE TO WHICH THE TRIAL COURT IMPROPERLY GAVE FULL FAITH AND CREDIT, WAS BASED UPON AN UNCONSTITUTIONAL ALABAMA STATUTE WHICH GAVE UNLIMITED AND ARBITRARY DISCRETION TO THE ALABAMA INSURANCE COMMISSIONER TO VALUE THE SUBJECT EMPIRE LIFE INSURANCE COMPANY ASSET AT ANY VALUE TO BE DETERMINED BY HIM.

The entire question of Empire Life Insurance Company's "insolvency" arose by Alabama Insurance Commissioner, John Bookout's determination that the life estate trust interest of Empire Life Insurance Company in the Libbie Shearn Moody Trust was to be arbitrarily devalued from $14,000,000 to approximately $4,250,000. Commissioner Bookout's authority

to make such an arbitrary determination was based upon Section 745 (13) which statute provides as follows:

> Sec. 745: "ASSETS" DEFINED. In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:
>
> (13) Other assets, not inconsistent with the provisions of this section, deemed by the Commissioner to be available for the payment of losses and claims, *at values to be determined by him.* (Emphasis added)

The value of $14,000,000 has been previously approved in 1965 by Alabama Commissioner Roussel and in 1968 by Alabama Commissioner Ussery, and by other insurance commissioners in the state of Texas and in the state of Arkansas. Yet, despite all of the prior approvals and despite Empire Life Insurance Company's reliance thereon, and business activity for more than seven years in reliance upon said prior valuations, Commissioner Bookout arbitrarily made this unconscionable devaluation and used as his sole authority therefor the abovementioned insurance code section, which is totally devoid of standards, guidelines, or other limitations. The arbitrary devaluation of more than $10,000,000 resulted in a unique insolvency under the very narrow and limited statutory insurance accounting principles. Despite the improper devaluation by Commissioner Bookout, Empire Life Insurance Company remained solvent and in good financial condition under the more commonly accepted, "generally acceptable accounting principles" and other forms of accounting.

It should be noted that Sec. 745(13) became effective January 1, 1972. There was no such code provision prior to said date which gave any of Commissioner Bookout's predecessor

commissioners such unlimited and totally arbitrary discretion, without standards of any kind.

It is the general principal of statutory law that a statute must be definite and certain to be valid. Furthermore, it has uniformly been held that a law violates due process if it is so vague and standardless that it leaves the public uncertain as to the conduct thereby prohibited, or leaves judges and juries free to decide without any legally fixed standards, what is prohibited and what is not in each particular case. (*Giaccio v. State of Pennsylvania*, 387 U.S. 399, 86 S.Ct. 518). If Empire Life Insurance Company was wrong in valuing the trust interest at $14,000,000, or in the alternative, was wrong by accepting the various state insurance commissioner's approval of the $14,000,000 valuation, then certainly they are entitled to clear and express standards in the Alabama Insurance Code upon which to base their conduct. Absent such standards, it is reasonable that they would accept and rely upon prior approval by the states of Alabama, Texas and Arkansas.

It is an elementary principal of law that an unconstitutional statute is void and unenforceable and has no legal effect. The same uniform principal of law is followed in the state of Texas and is more particularly described as follows:

> It is the general rule that an unconstitutional statute, though having the form and name of law, is in reality no law and in legal contemplation is an inoperative as if it had never undergone the formalities of enactment. Such a statute leaves the question that it purports to settle just as it was prior to its ineffectual enactment. *It is invalid and it imposes no duties, confers no rights*, creates no office, *bestows no power*, affords no protection, and *justifies no acts performed under it.* (Emphasis added) (12 *Tex. Jur.* 2d 391) *Miller v*

> *Davis*, 136 Tex. 299, 150 S.W.2d 973, 136 A.L.R. 177, *Colden v Alexander*, 141 Tex. 134, 171 S.W. 2d 928.

B. THE APPLICATION AND ENFORCEMENT OF SECTION 745 (13) BY THE ALABAMA STATE COURT DEPRIVED PETITIONERS OF SUBSTANTIAL CONTRACTUAL AND PROPERTY RIGHTS IN VIOLATION OF DUE PROCESS, AND, THE IMPROPER GRANTING OF FULL FAITH AND CREDIT BY THE TRIAL COURT FURTHER COMPOUNDED PETITIONER'S DENIAL OF DUE PROCESS.

It is an undisputed fact in the case at bench that prior to Alabama Insurance Commissioner Bookout's improper devaluation of the trust interest of Empire Life Insurance Company, said insurance company relied upon prior approvals of the $14,000,000 trust valuation by prior Alabama insurance commissioners and commissioners of the states of Arkansas and Texas. Furthermore, it is undisputed that from 1965 to 1972, petitioners and other shareholders and policyholders of Empire Life Insurance Company obtained vested and substantial contractual rights and property rights on the basis of the $14,000,000 approved valuation.

The subsequent enactment, in 1972 of Section 745(13) of the Alabama Insurance Code, and the subsequent devaluation by Commissioner Bookout, effectively destroyed, impaired and otherwise deprived said petitioners, shareholders, creditors and policyholders of Empire Insurance Company of their substantial vested property and contractual rights.

It is an elementary principal of federal and state constitutional law that once one has become possessed of a property right created by law, the legislature may not deprive him of

that property right by changing the law, *Middletown v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916); *International & G.N.R. Co. v. Edmondson (Com.)* 222 S.W. 181 (1920); *Arnold v. Sherman* 244 S.W. 2d 880 (Tex. Civ. App. — Dallas 1951, writ ref'd n.r.e.)

It has also been uniformly held that vested rights may not be destroyed or impaired, and an enactment that would effect a destruction or impairment of a vested right is invalid. *State v. Mitchell*, 110 Tex. 498, 221 S.W. 925 (1920); *Miller v. Letzerich*, 121 Tex. 248, 49 S.W. 2d 404, 85 A.L.R. 451 (1932).

Therefore, if Section 745 (13) is relied upon by Alabama Commissioner Bookout as authority for him to arbitrarily devaluate substantial assets of Empire Life Insurance Company and thereby impair, destroy, or otherwise deprive individuals of vested contractual and property rights, said authority is invalid and constitutes a violation of Article I Section 10 of the U.S. Constitution.

Although petitioners attempted to raise all of the above objections in the trial court, they were precluded from doing so by virtue of the trial court's granting of full faith and credit to the Alabama state court decree. The granting by the trial court of full faith and credit did not cure the fatal defects and unconstitutional deprivations suffered by the petitioners as mentioned above.

III.

THE FAILURE OF THE ANCILLARY RECEIVERSHIP COURT TO PROVIDE THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE WITHIN ITS

JURISDICTION WITH NOTICE OF THE ANCILLARY RECEIVER'S PETITION FOR AUTHORITY TO CONSUMMATE THE TREATY OF ASSUMPTION AND BULK REINSURANCE, OF THE HEARING THEREON, AND AN OPPORTUNITY TO BE HEARD AT SAID HEARING DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

No notice whatsoever was provided to Empire's policyholders, stockholders and creditors situated within the State of Texas of the Ancillary Receiver's Petition For Authority To Consummate the Treaty of Assumption and Bulk Reinsurance, or the hearing thereon, nor were they provided with an opportunity to appear and object to the same.

> [Petitioners' Counsel] But you never gave any notice concerning this receivership in Texas, did you?
> [Ancillary Receiver] No [S.F. 130 Feb. 1975 Trial]

Petitioner Moody specifically asserted in his Opposition to the Receiver's application that the failure to notify Empire's policyholders, stockholders and creditors of said application denied them the due process of law guaranteed by the Fourteenth Amendment. (A-18, A-19). Petitioner Bleker, a policyholder, indicated in his Plea of Intervention that he had *no* notice of the appointment of an ancillary receiver and requested that the court give policyholders an opportunity to appear at the hearing on the Treaty. But the court refused to do so! Given the fact that a majority of Empire's policyholders and assets are within Texas, such blatent denial of the basic elements of due process, notice and an opportunity to appear, is simply incredulous and taints the entire ancillary proceeding.

All the Reinsurance Agreement provides is that the policyholders, *after* the Reinsurance Agreement has been approved and implemented. are notified that they can accept the agreement or elect to be a general creditor in a fund that is likely to be quite insufficient to give them what they previously bargained for. In either case they will be forced to take less than their contractual rights under their policies.

It is the general rule in receiverships that no action may be taken against any party in interest unless that party is given notice and an opportunity to be heard on the matter. *2 Couch on Insurance 2d*, Section 22:52 (1960). *Salas vs. Gonzalez*, 181 S.W.2d 821 (Tex.Civ.App.-San Antonio 1944, no writ); *Marion vs. Marion* 205 S.W.2d 426 (Tex.Civ.App.-San Antonio, 1947, no writ). When faced with the interpretation of regulatory schemes governing liquidation and reinsurance, the courts have indicated that due process requires that the judiciary should attempt to afford the affected parties the fullest opportunity for a hearing consistent with the protection of the public interest. *Stewart vs. Citizens Casualty Co. of New York*. 23 N.Y.2d 407, 244 N.E.2d 690, 692 (1968); *Britton v. Green*, 325 F.2d 377 (10th Cir. 1963); *Morris v. Investment Life Ins. Co. of America*, 204 NE2d 550, 1 Ohio App. 2d 330 (1960); *Lucas vs. Manufacturing Lumbermans Underwriters*, 349 Mo. 835, 163 S.W.2d 750 (1942).

Under the Texas Insurance Code, the only provision for action to be taken without notice is where the issuance for an injunction restraining the insurer or others from wasting or disposing of the company's property pending further order of the court. Tex. Ins. Code Ann. art. 21.28, Section 4(a)(2). Under subsection 2, the court may enter such other injunctions or orders as

may be necessary to prevent interference with the proceedings, the obtaining of preferences, etc. Nothing is said about other orders without notice. Thus, notice should be given for action under these provisions. Notice is further required to be given to all "claimants". Tex. Ins. Code Ann. art. 21.28(3). In the present action, no notice was given to Empire's policyholders, stockholders or creditors situated within the State of Texas of the February, 1975 hearing on the Ancillary Receiver's application for authority to consummate the Treaty of Assumption and Bulk Reinsurance.

Although there is no express statutory provision one way or the other concerning notice to policyholders before reinsurance and liquidation, certainly from the above general statutory scheme, it is evident that such notice should have been given, not only as a matter of Texas law, but also as a matter of Federal constitution law. Indeed, in passing upon The Reinsurance Agreement, the Alabama Supreme Court expressly noted that "Approximately one-half of the Empire policyholders reside in Texas, and most of Empire's physical assets are located in that state." *Moody v. State of Alabama*, 344 So.2d 160 (1977). Evidently the Alabama Supreme Court felt compelled to refer to the opinion of the Texas Court of Civil Appeals below since a majority of Empire's assets and policyholders are in Texas. In light of this fact, the issue of procedural due process in the present proceeding becomes extremely significant. Query? Should policyholders, creditors and stockholders in Texas have the assets of their company removed from the state without an opportunity to appear at a hearing and object to the same? At a minimum, this is exactly what the notion of due process requires.

This court, in a series of cases has made clear that the state

cannot participate in the interference with or the taking of individual property interests without prior notice and opportunity for hearing. *Goss vs Lopez*, 419 U.S. 565, 95 S.Ct. 729, (1975); *Wisconsin vs. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971); *Boddie vs. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971); *Board of Regents vs. Roth*, 408 U.S. 564, 92 S.Ct. 2701, (1972); *Fuentes vs. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, (1969).

In *Mullane vs. Central Hanover Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), this Court indicated that the "words of the due process clause . . . . require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane, supra*, 339 U.S. at 313. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis vs. Orlean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914). A right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . . contest." *Mullane, supra.* 339 U.S. at 314, 70 S. Ct. at 657.

In *Fuentes vs. Shevin, supra.*, this Honorable Court held that a state replevin statute which allowed a Plaintiff to recover property from a Defendant, summarily without notice to the Defendant, and an opportunity for a hearing, violated the due process clause of the Fourteenth Amendment. Similarly, in *Goldberg vs. Kelly*, 387 U.S. 254, 90 S.Ct. 1011 (1970), this Court held that a state was without power to deprive a family on welfare of their vested expectancy in welfare checks without giving the recipient prior notice and an opportunity for a hearing prior to the cutoff period.

The present case is no different from these previous Supreme Court cases. Policyholders, stockholders and creditors in the present action were not given notice of the Ancillary Receiver's application to consummate the Treaty of Assumption and Bulk Reinsurance of the hearing thereon or with an opportunity to appear. Clearly, the due process clause of the Fourteenth Amendment required notice to Empire's policyholders, stockholders, and creditors within the state of Texas and an opportunity to appear at the hearing and raise objections to the proposed Treaty of Assumption ad Bulk Reinsurance.

Further, since Empire's policyholders were not provided with notice of the Ancillary Receiver's Application for Authority to Consummate the Reinsurance Agreement and accordingly were not provided with a reasonable opportunity to object to the Treaty, the objections of Petitioners Moody and Bleker, a policyholder, with regard to the lack of notice on behalf of the policyholders should have been entertained by the Court of Civil Appeals below. "The principal [pertaining to standing] is not disrespected where constitutional rights of persons who were not immediately before the court could not be effectively vindicated except through an appropriate representative before the court." *N.A.A.C.P. vs. State of Alabama*, 78 S.Ct. 1163, 1170, 357 U.S. 449, 458 (1958); *Swan vs Adams*, 87 S.Ct. 569, 385 U.S. 440 (1967); *Barrows vs. Jackson*, 73 S.Ct. 1031, 346 U.S. 249 (1953); *Pierce vs. Society of Sisters*, 45 S.Ct. 571, 268 U.S. 510 (1925).

IV.

THE TREATY OF ASSUMPTION AND BULK REINSURANCE DENIED THE POLICYHOLDERS, STOCKHOLDERS

AND CREDITORS OF EMPIRE THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT BY TREATING DIFFERENTLY THOSE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS WHO WERE SIMILARLY SITUATED AND BY FAILING TO TREAT THOSE WHO WERE DIFFERENTLY SITUATED IN A MANNER CONSISTENT WITH THEIR RESPECTIVE RIGHTS.

Shortly after Empire was placed in receivership in the State of Alabama in 1972, the Alabama Trial Court directed the Domiciliary Receiver, John G. Bookout, to take whatever action was necessary to rehabilitate Empire and to solicit proposals for its rehabilitation. Tom McFarling, the then temporary Ancillary Receiver for Empire in Texas, petitioned the Ancillary Receivership Court for authority to approve a plan of rehabilitation with regard to Empire. On February 9, 1973, the Texas Ancillary Receivership Court approved a plan of rehabilitation with regard to Empire that had similarly been approved and adopted by the Alabama Domiciliary Receivership Court.

During the period that Empire was to be rehabilitated, Mr. Clay Cotten, former Texas Commissioner of Insurance, wrote the Domiciliary Receiver, Bookout, and instructed him that any rehabilitation of Empire would be unacceptable. Outrageously enough, the Texas and Arkansas Ancillary Receivers also communicated their adamant opposition to rehabilitation of Empire, not only to the Domiciliary Receiver, but also in ex parte fashion to the Domiciliary Receivership Court.

Indeed, in the early part of 1974, an Assistant Attorney General in the office of the Attorney General of the State of

Texas expressed "alarm" at having heard that Judge Barber, the Domiciliary Receivership Court had announced his inclination to appoint "an administrator" for Empire Life for the sole purpose of rehabilitating the company. The Assistant Attorney General outlined in an inter-office communication (See Addendum to Petition) that "if he [the Domiciliary Receivership Court] does not back down from his ridiculous notion of appointing an "administrator", we can deal with the problem before his Order becomes final."

It is obvious from the foregoing that the State of Texas had no intention of making a good faith effort to rehabilitate Empire in accordance with the plan of rehabilitation approved by the Ancillary Receivership Court in February of 1973, but instead chose to persist in demanding the liquidation of Empire. As a result, the liquidation of Empire ensued and a Treaty of Assumption and Bulk Reinsurance was approved which treated differently those Empire policyholders and creditors who were similarly situated and failed to treat those who were differently situated in a manner consistent with their rights.

The response of the Texas Court of Civil Appeals to the Petitioners' attack upon the unlawful preferences and discriminatory treatment effected by the Reinsurance Agreement was that the differences in treatment were not unlawful discrimination because of the different contractual relationships which various groups of policyholders and creditors have had with Empire. However, the record below was barren of any such differences. It is clear therefore that the axiom asserted by the Court of Civil Appeals assumed the very issue in dispute: whether the differences between the various groups of Empire's policyholders and creditors are "real and substantial differences"

justifying the preferential and discriminatory treatment accorded those groups under the Reinsurance Agreement.

The Petitioners respectfully submit that the Reinsurance Agreement as amended does not reflect the proper application of the principle cited by the Court of Civil Appeals, since it not only fails to treat those who are differently situated in a manner consistent with their rights, but it also unlawfully discriminates among the policyholders and creditors of Empire who are similarly situated. Thus, the Reinsurance Agreement denies Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment.

In insurance company receivership proceedings, it is the general rule that both policyholders and general creditors are entitled to share pro rata in the distribution of the assets of the company. *See, Clark v. Williard*, 292 U.S. 112 (1935). The purpose of the insurance company receivership acts, much like the Bankruptcy Act, is to put all claimants, including both policyholders and general creditors, on an equal footing and to prohibit preferential treatment for any of the parties. See 2 *Couch on Insurance 2d*, §22.82, pp 775-780 (1960). Policyholders are general creditors of an insurance company in receivership, and as such are entitled to share ratably in the distribution of the assets of the company. *Palmer, ex rel. American Bankers Ins. Co. v. Palmer*, 363 Ill. 499, 2 N.E.2d 728, 106 A.L.R. 447 (1936). Policyholders are also expressly prohibited from receiving any preferential treatment.

In Alabama, the procedure for the liquidation of insurance companies and the payment of creditors thereunder is governed by the Alabama Insurance Code, Title 28-A, Sections 621-641. This provision is, with some modification, the Uniform Insurers

Liquidation Act and became effective in Alabama on January 1, 1972. It is without question that the purpose of the Uniform Insurers Liquidation Act is to achieve equality among claimants. 2 *Couch on Insurance 2d*, Section 22:28, p. 702 (1960); *Ace Grain Company v. Rhode Island Insurance Company*, 197 Supp. 80 (1952), *aff'd*. 199 F. 2d 758 (2d Cir.); 46 A.L.R. 2d 1185.

The Alabama rule against preferential treatment was made clear in the case of *Melco Systems v. Receivers of Transamerica Insurance Company*, 105 So.2d 43 (Ala. 1958). In that case a reinsurer had agreed to pay a certain sum for its liability under a reinsurance agreement with an insurance company in receivership. The Supreme Court of Alabama held that the proceeds of the reinsurance agreement constituted general assets to which the plaintiff insured had no priority over other creditors. All creditors had to share equally in the assets of the company and this included policyholders. As that court stated:

> No subsequent act of the liquidating agent in the course of his duties as trustee can give one creditor a preference over others of like class . . . Equality is equity.

See also Art. 1040, 1975 Alabama legislature session prohibiting preferential treatment.

Texas has not adopted the UILA. Nevertheless, the Texas courts have made it clear that in Texas all creditors of an insolvent insurance company must share equally in the distribution of the assets of that company, and that no creditor or policyholder is entitled to preferential treatment in receivership proceedings. *McFarling v. Mayfield*, 510 S.W.2d 108 (Tex. Civ.

App-Beaumont 1974, writ ref'd. n.r.e.). In that case the Court of Appeals held that judgment creditors against an insolvent insurance company were not entitled to direct payments from the proceeds of a reinsurance agreement since to do so would be to prefer those creditors over others. As that court held at 109:

> Generally, all creditors of an insolvent insurance company are entitled to share equally, 44 CJS 733, Insurance §134 (1945); 75 CJS 919, Receiver §283 (1952). Art. 21.28-B, V.A.T.S. The "Loss Claimants Priorities Act", (60th Leg. 1967) gives appellees a preferred claim, but no statutory authority is given for the preference granted by the trial courts judgment. Reversed and rendered.

Not only is preferential treatment of certain claimants unlawful under Texas and Alabama law, but to the extent that one claimant is preferred, others are discriminated against. Such discrimination between policyholders of the same class is unlawful TEX. INS. CODE ANN. art. 21.21 §4(7), Art. 21.21-A; ALA. INS. CODE TITLE 28A §237. Where this discriminatory treatment is being accomplished by state action and has no rational or reasonable basis, it is also in violation of the Equal Protection Clause of the United States Constitution. *See, e.g., Weber v. Aetna Gas & Ins. Co.*, 406 U.S. 615, 92 Ct. 1400 (1972).

The applicable principle regarding the equal protection of the laws guaranteed by the Fourteenth Amendment was set forth by Mr. Justice Reynolds in *Hartford Steam Boiler Inspection & Ins. Co.*, 301 U.S. 459 (1957) in an excerpt cited from *Louisville Gas & Electric Company v. Coleman, Auditor*, 277 U.S. 32, 37, 38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928):

> 'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, [citations omitted] and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. [citations omitted]. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [citations omitted] That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' [citations omitted]. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. [citations omitted].

See also, Barbier v. Connolly, 113 U.S. 27, 31, 5 S. Ct. 357 (1885).

The rule against preferential and discriminatory treatment of any claimant, whether a policyholder, creditor, or otherwise, is important in the present case because it is clear from review of the Reinsurance Agreement between Protective and Empire that the agreement effects such preferential and discriminatory treatment, and there is absolutely nothing in the record to justify such treatment.

Indeed, the Petitioners would assert that the transfer of Empire's assets as reserve funds to Protective under the Rein-

surance Agreement is, in itself, a preferential transfer which unlawfully discriminates among Empire's creditors and policyholders contrary to both Texas and Alabama law. Although the Texas Legislature has indicated that in proceedings instituted against out-of-state insurance companies under Article 21.28-A Section 6 of the Texas Insurance Code, a transfer of assets as reserve funds to a reinsuring company by a conservator shall not be deemed a preference of creditors, no comparable provision exists allowing such a preferential transfer by a receiver in the present receivership proceeding instituted under Article 21.28 Section 13 of the Texas Insurance Code. Thus, the transfer of Empire's assets as reserve funds to Protective under the Reinsurance Agreement is, in itself, a preferential transfer unlawfully discriminating among Empire's creditors and policyholders.

As the largest single stockholder of Empire and as a creditor of Empire (S.F. 164, 264, 1278), Petitioner Moody clearly has a substantial interest in attacking a reinsurance agreement which deprives stockholders of their entire equity without providing them with any benefits in return (S.F. 253, 814) and which deprives creditors of their contractual rights with Empire. The Texas Supreme Court has indicated that in receivership proceedings the stockholders and creditors of an insolvent corporation are parties in interest and as such are, in effect, parties to the proceeding bound by all decrees rendered therein. *Shaw v. Strong*, 128 Tex. 65, 96 S.W.2d 276 (1936). The Receiver is "the representative and protector of the interest of all persons, including creditors, shareholders and others, in the property in receivership." *Security Trust Company of Austin v. Lipscomb County*, 142 Tex. 572, 180 S.W.2d 151 (1944). "The general

rule is that when a court takes control and custody of the property of a corporation by the appointment of a receiver, all creditors of the corporation are in effect or constructively before the court; . . ." *Security Trust Company of Austin* at 157-8 and authorties cited therein.

When Moody assigned the two-fifths (2/5) of a one-eighth (1/8) life estate interest in the Libbie Shearn Moody Trust to Empire he received in exchange therefor a $221,000 debenture (S.F. 1278). Moody has also filed two claims against the receivership estate totalling approximately $2,000,000, one of which was filed on behalf of W. L. Moody & Company Bankers (Unincorporated) (S.F. 164). Thus, Moody is clearly a creditor and an interested party in the receivership proceeding having the requisite standing to attack any action by the ancillary receivership court. "The appointment of a receiver is not made for the purpose of destroying the rights of persons, but rather that their rights be made more secure." *Cocke v. Wright*, 299 S.W. 446, 448 (Tex. Civ. App. — Dallas 1927, no writ).

As an interested party whose rights as a stockholder and creditor of Empire are being destroyed or significantly reduced by the Reinsurance Agreement, Moody clearly has standing to complain of its discriminatory treatment. As a policyholder and stockholder of Empire, Petitioner Bleker's standing is obvious. These discriminatory features are set forth below.

1. *Unfair Discrimination Against Policyholders Rejecting Reinsurance.*

One obvious element of preferential treatment given by the Reinsurance Agreement is to prefer policyholders who accept the Reinsurance Agreement over those who do not. Under Sec-

tion XIV of the Reinsurance Agreement (Receiver's Exhibit 6, P. A-56), it is provided that all policyholders who do not reject the reinsurance assumption in writing within 60 days after notice are deemed to have accepted the Reinsurance Agreement and all the terms thereof. They are further deemed to have agreed to have allowed Protective to file claims with the Receiver in the amount of the total moratoriums placed on the policies. Any amount received by Protective from the Receiver pursuant to these claims is, under the Reinsurance Agreement, to be added by Protective to the Empire fund and this amount will accrue to the benefit of the policyholders whose policies are reinsured. Policyholders who thus consent to the reinsurance have the benefit of the reinsurance and, in addition, have the benefit of a claim against the fund in the hands of the Receiver. On the other hand, policyholders who reject the assumption are left with nothing but a claim against the fund. Policyholders who accept thus have two bites of the apple; policyholders who reject have but one (S.F. 195). Certainly this is preferential treatment to policyholders who accept the Reinsurance Agreement under any sense of the words, and is contrary to both Texas and Alabama law.

Unfortunately, for policyholders who reject the Reinsurance Agreement, there is even no guarantee that they will have one bite of the apple. There has been no determination as to whether the $2,000,000 fund left with Empire to pay general creditors, rejecting policyholders, and the expenses of administration would be sufficient to pay such claimants roughly the same thing being given to accepting policyholders, i.e., approximately 65% of what they are entitled to (*See* S.F. 699, 797). Indeed, the blatant inadequacy of the $2,000,000 fund is underscored by Empire's

1973 Annual Statement which reflects liabilities of approximately $37,000,000 of which $31,000,000 were reserves (Defendants' Exhibit 23 below). This means that the general creditors whose claims represent $6,000,000 of Empire's liabilities will have to rely upon the balance of the $2,000,000 fund to satisfy their claims after the expenses of administration are first paid from the $2,000,000 fund. In the hearing on the Ancillary Receiver's application for authority to consummate the reinsurance agreement, Herbert Crook, the Ancillary Receiver, admitted that at the time of the hearing no computation had been made of the total amount of claims against the receivership estate (S.F. 162). When confronted with the question of whether he had computed the amount of such claims at the time he had determined that the Reinsurance Agreement was in the best interest of Empire's policyholders and creditors, the Ancillary Receiver candidly admitted: "Not the total amount, no" (S.F. 164).

Indeed, the Petitioners would submit that a prior determination as to the adequacy of the $2,000,000 fund was mandated as a matter of both Texas and Alabama law in order to prevent unlawful discrimination against the rejecting policyholders and creditors who must rely on the fund to satisfy their claims. In *Melco Systems v. Receivers of Transamerica Inc. Co., supra,* Employers, the reinsurer of Trans-America had agreed to compromise the claims against Transamerica by paying $130,000 to the receiver provided that this amount settled all claims against Employers by Transamerica, its receiver or any other persons, arising out of the reinsurance contract.

After a hearing and testimony, the trial court held that it was in the best interest of the receivership to accept the com-

promise offer of $130,000. The Alabama Supreme Court affirmed the holding of the trial court with the following statement:

> We must assume that the trial court, in approving the compromise, took into consideration the probable validity of Employers' claims, the difficulty of enforcement by the receivers, the collectibility of any judgment recovered, the delay, expense and trouble of litigation, and the amount of the compromise offer as compared with the amount and collectibility of various judgments in favor of the receivers against Employers.

In the present proceeding, however, there has been absolutely no determination by the Domiciliary receivership court or the Ancillary receivership court below as to the adequacy of the $2,000,000 fund to satisfy the claims of Empire's rejecting policyholders and creditors and to pay the expenses of administration. Certainly this accords preferential treatment to accepting policyholders and unlawfully discriminates against rejecting policyholders who simply have no guarantee that they will receive the amount to which they are entitled.

In the proceedings before the Ancillary receivership court below, Herbert Crook testified that Protective's right to file a claim on behalf of consenting policyholders against the $2,000,000 fund was conditioned upon the event that the rejecting policyholders and other claimants received a dividend or more than the value of reinsurance initially allocated to accepting policyholders (S.F. 192). Yet, Mr. Crook candidly admitted that the Reinsurance Agreement contains no provision expressly conditioning such right on the part of Protective to file a claim on behalf of consenting policyholders to such a situation (S.F. 193). Accordingly, such right is also an instrument of potential discrimination.

In response to the Petitioners' argument regarding the unlawful discrimination against rejecting policyholders, the Court of Civil Appeals has asserted that: "Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination." [p. A-4]. Yet, it is difficult to understand how an election to reject reinsurance can be characterized as "voluntary" when a policyholder has no information other than an Assumption Certificate and a letter from Protective to determine whether he will receive fair and equal treatment. If neither of the receivership courts nor the receivers knew whether the $2,000,000 fund would be sufficient to handle all of the claims against Empire, how could a policyholder be assumed to know? Thus, the Court of Civil Appeals clearly erred as a matter of law in holding that the $2,000,000 fund left with the Receiver would be sufficient to satisfy equitably the claims of Empire's general creditors and rejecting policyholders. Given the absence of a rational basis for the discrimination described above, the policyholders and creditors of Empire have been denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

2. *Unfair Discrimination Against Creditors Whose Claims Are Not Assumed by Protective.*

Under the Reinsurance Agreement, Protective does not assume all the liabilities of Empire. Liabilities that were not assumed are set forth in Section VI G of the Agreement and include claims of creditors, claims for dividends on certain policies, the obligations of liability for certain commissions, unpaid premium taxes, and any deficiency obligation respecting mortgages (Receiver's Exhibit 6 p. A-37). Unfortunately, there has been

no computation of the amounts of liabilities not assumed and therefore, the trial court had no way of knowing that the creditors whose debts were not assumed will receive more or less than those whose debts were assumed. This is clearly an unlawful and discriminatory preference against the creditors whose claims are not assumed and who must confront the reality that no determination has been made as to the adequacy of the $2,000,000 fund to satisfy the claims of Empire's creditors (S.F. 699).

For example, Section VI G, paragraph 8, indicates that the non-assumed debts include any deficiency with respect to mortgaged real estate. The annual statement of Empire for the year ending on December 31, 1973 (Defendants' Exhibit 23 below) reflects that Empire had mortgage loans on its home office building in Dallas and other properties. But there was no determination made as to whether there might be any deficiency and if so, the amount. Presumably if any such deficiency does exist, it would consume a large portion of the $2,000,000 reserve fund. Further, under Section VI G, paragraph 3, [p. A-38] the obligation of Empire to W. L. Moody and Company under a guaranty agreement for about $700,000, as reflected in the 1973 annual statement, is also a non-assumed debt which will consume a significant portion of the reserve fund. The foregoing highlights not only the blatant inadequacy of the $2,000,000 reserve fund to satisfy the claims of Empire's creditors, but it also underscores the unfair discrimination being accorded to creditors of Empire whose debts are not assumed by Protective. Indeed, under the axiom asserted by the Court of Civil Appeals, unless a significant difference can be shown to exist between the creditors whose claims are assumed and those whose claims are

not assumed, the difference in treatment accorded to those creditors whose claims are not assumed is a violation of the Equal Protection Clause of the Fourteenth Amendment. The truth is there is no reason for the difference in treatment of Empire's creditors, and the ancillary receiver failed to prove any justification for the preferential treatment.

3. *Discrimination Regarding Pending Claims.*

Under Section VI G of the Agreement, Protective assumes only the claims against Empire that have been accepted by Empire or which are pending as of the effective date of the Agreement. Protective does not assume claims that Empire has previously rejected, whether or not such claims are pending in court. This is clearly unlawful discriminatory treatment which the Court of Civil Appeals failed to discuss with respect to valid claims which have been rejected by Empire and preferential treatment with respect to the others. Again, no reason exists for such differential treatment.

4. *Unfair Discrimination Against Empire's Agents.*

Further, the Agreement provides in Section VI that Protective assumes Empire's liability for agent's commissions on premiums paid to June 29, 1972. But Protective assumes no liability for the payment of commissions to agents for premiums collected after June 29, 1972. Certainly this provision unlawfully discriminates against Empire's agents as creditors and prefers other creditors and certain agents' claims (S.F. 699, 811). Moreover, the significance of the date June 29, 1972 was never explained.

5. *Unfair Discrimination in the Application of Different Moratorium Amounts to Different Policyholders.*

Concerning preferential treatment of certain policyholders, the Reinsurance Agreement gives certain policyholders more than others, and gives certain policyholders less. For example, the Reinsurance Agreement, Section VIII, (A-47) provides that the moratorium is 35% of the *withdrawable* funds of certain specified policies; 35% of the *total value* of certain separate accounts of other policies; and 35% of the *net reserves* of certain policies. This obviously results in different treatment for different classes of policyholders. However, there was no showing in the trial court that the different contractual relationships justified such treatment.

Indeed there is no definite evidence on how the 35% moratorium was arrived at. Mr. Pennington, Vice-President and actuary of Protective, did make several projections on the Empire business. (See Defendants Ex. No. 11). According to his projections, the business of Empire would be sufficient to eliminate the moratorium in a ten year period, if not sooner. He testified that Protective expects to make a profit on the Empire policies of one-half of a million dollars per year for 10 to 15 years after the moratorium is eliminated. (S.F. 1415).

According to Empire's 1973 Annual Statement, (Defendants' Ex. No. 23), it had $31,000,000.00 of statutory assets and approximately $36,000,000.00 of liabilities. Had the moratorium been calculated according to even the deficiency in Empire's Annual Statement, the deficiency would be about 39 to 36, and the moratorium would be about 20%. (S.F. 643). Thus even according to Empire's statutory financial position, there should be no justification for a moratorium of greater than 20%, rather than the 35% imposed by the Reinsurance Agreement.

Indeed, such a computation, and even the computation made by Protective gives no consideration at all for the value of business in force of Empire. According to the Stennis Report, the value of that business is approximately $6,000,000.00 (Defendants' Ex. No. 10). Thus Protective is entering into an agreement to assume assets of Empire which by Protective's own projections are sufficient of their own to reduce the moratorium placed on the policy by ten years, if not sooner. At the end of this period of time, Protective gets the full value of the Empire business, for which it pays essentially nothing (See S.F. 678, 794). Even a 20% moratorium would not give sufficient consideration for the value of the Empire business. Moreover, no moratorium would give sufficient consideration to the actual value of the Libbie Shearn Moody Trust (S.F. 643). According to the valuation made by Dr. Joseph Trosper, Professor of Insurance at Indiana University, that interest has a value of not less than approximately $14,000,000.00 (Defendants Ex. No. 14). If Empire's trust interest has such a valuation, there is no need for any moratorium; indeed there is no need for a Reinsurance Agreement at all. (S.F. 791).

Moreover, Protective is given the benefit of certain assets which have a value greater than the statutory carrying value. For example, certain subsidiaries are valued and transferred at the book value though the actual value of these subsidiaries are probably much greater (See S.F. 813).

Adding all this up, the conclusion is that Protective is getting such a good deal that they cannot afford to pass it up. Mr. Pennington projected a profit to Protective of 5-7½ million dollars from the Reinsurance Agreement. (S.F. 1415). This is obviously at the expense of Empire's policyholders, creditors

and stockholders. Had the moratorium been based on an asset to liability ratio, which should have been done, the moratorium, according to the statutory statement, would only be 20% (S.F. 794, 795). Had proper value been given to the business of Empire, the subsidiaries and other assets of Empire, and the life estate interest of Empire, there would be no moratorium needed; in fact there would be no Reinsurance Agreement despite the fact that each item of benefit to Protective amounted to a greater diminution of policyholders rights.

6. *Unfair Discrimination Against Policyholders Who Elect Reduced Paid-Up or Extended Term Insurance.*

The Reinsurance Agreement not only discriminates among policyholders and creditors who are similarly situated, but also fails to treat the policyholders who are differently situated in a manner consistent with their rights as defined by their contractual relationship with Empire. In Section VIII B 1(d), (A-45) it is provided that if a policy is placed on a reduced paid up or extended term insurance, the amount of such insurance is reduced by one-half (½) of the then existing moratorium. The same section further provides that the moratorium continues against the paid up insurance and is to be deducted from its cash surrender value. Accordingly, these policyholders are charged twice, once with the one-half (½) moratorium and next with 100% of the moratorium (S.F. 652, 808). These policyholders are clearly discriminated against and are treated in a manner which is clearly inconsistent with their rights as holders of policies placed on reduced paid up or extended term insurance. There is simply no evidence in the record justifying the double imposition of a moratorium upon these policy-

holders. Again, the Court of Civil Appeals failed to confront this discriminatory provision of the Reinsurance Agreement in its opinion holding that the Reinsurance Agreement does not unlawfully discriminate among Empire's policyholders.

7. *Unfair Discrimination in the Form of Preferential Treatment for Consenting Policyholders.*

Under the First Amendment to this Reinsurance Agreement, Paragraph 4, (p. A-71), it is provided that the Receiver shall assign to Protective death proceeds from insurance policies on the life of Moody in the amount of $4,350,000, subject to increase or decrease of that amount to match the admitted asset value of Protective's interest in the Libbie Shearn Moody Trust. (The $4,350,000 figure exceeds by $100,000 the admitted asset value and the Agreement contains no justification whatsoever for the excess.) In fact Dr. Olshen testified that it was an error (S.F. 500). The Receiver is to pay all premiums on the life insurance on Moody's life and Protective is to reimburse the Receiver annually for its pro rata part. However, if Protective, upon non-payment by the Receiver pays the premiums, Protective receives all of the policy benefits, or $12,000,000. Accordingly, Protective may receive all of the insurance proceeds on Moody's life (S.F. 203-5). Such proceeds could be sufficient to entirely eliminate the moratorium, in which event Protective, not the creditors and stockholders, will retain the excess under the terms of the Reinsurance Agreement. Upon the elimination of the moratorium by that windfall or by ordinary profits on the business (which Mr. Pennington projected would occur in ten years with a 35% moratorium S.F. 1415), the consenting policyholders whose policies are reinsured will thereafter receive

100% of their claims, but the non-consenting policyholders and all other creditors (who have at least $6,000,000 worth of claims) have only a claim for their pro rata part of the two million dollar fund, if any is left after paying expenses of administration. This is clearly preferential treatment of accepting policyholders over rejecting policyholders and Empire's creditors, and the ancillary receiver offered no proof to justify this preferential treatment.

8. *Unfair Discrimination Regarding the Payment of Dividends.*

With respect to the payments of dividends on Empire policies, the Reinsurance Agreement approved by the Trial Court unlawfully prefers certain policyholders in several ways. Most of the policies issued by Empire or reinsured by it were "participating" policies, i.e., the company paid dividends upon the policies to the policyholders. In the case of the American Trust policies, the dividend obligation was a contractual one under a Reinsurance Agreement between American Trust and Empire (Defendants' Exhibit 13). In other words, the amount of the dividend was not left to the discretion of the board of directors of the company, but had to be in a certain specified amount. However, in Section XII A of the Reinsurance Agreement (A-53), the dividend obligation of Empire to American Trust was not assumed. The Reinsurance Agreement provides in Section XII A 1 and 2 (A.54-5), that dividends on policies assumed by Protective shall thereafter be declared only at the sole discretion of Protective, except in the case of Presidents Special Investors Plan (PSIP) policies issued by Empire Life Insurance Company of America, Little Rock, Arkansas, and assumed by Empire which are different policyholder obligations under the Reinsurance Agreement. Clearly then, the Reinsurance Agreement unlawfully discriminates among policyholders who are similarly situated; i.e., policyholders who were entitled to dividends by virtue of their contractual relationship with Empire.

9. *Discrimination as to Amounts Left on Deposit*

Policyholders with matured endowments or coupons left on deposit, persons who have simply not yet collected money due them with Empire prior to the effective date of the Reinsurance Agreement, are charged the full amount of the moratorium as to these amounts, but persons whose endowments mature after the effective date, or whose coupons are left on deposit after the effective date are not so charged (Receiver's Exhibit 6). This obviously prefers certain policyholders over others (S. F. 813). However, no testimony was offered justifying this different treatment.

10. *Discrimination as to Policy Loan Applications*

Although the moratorium is stated to become effective as of the effective date of the Reinsurance Agreement and chargeable against withdrawable funds, including the policy loans, it is stated in Section VIII A-1 (A-43), that in determining moratorium amounts, policy loan requests after June 29, 1972 (a date about 2½ years prior to approval of the Reinsurance Agreement and about three years prior to its effective date which is included) shall be disregarded. This prefers policyholders who made their loan requests prior to that date and discriminates against those who requested loans after that date yet there was no testimony as to any justification for such discrimination, nor for the election of such date.

11. *The Tontine Aspect of the Reinsurance Agreement Unlawfully Discriminates Between Policyholders*

Tontine Insurance derives its name from its Italian inventor Tonti. The original concept was that premiums were invested for a number of persons and income was divided among all, but shares of members who died did not go to the insured's legal representatives but to the interest of the last surviving members until the last survivor took the whole income and principal. *1 Couch on Insurance 2d* §1:102, pp. 98-99 (1960). Tontine policies have been outlawed by every state in the nation. (See i.e. ALA. INS. DEPT. REG. #15).

In the present case Doctor Olshen, the Domiciliary Receiver's expert witness, testified that one of the elements of the Reinsurance Agreement was that the agreement has a semi-tontine effect (S.F. 308). Dr. Trosper, an expert who testified on behalf of the Defendants, explained how this tontine aspect worked (S.F. 802, 803, 804). The moratorium at the beginning is set at 35% (which was later increased to 50%). However, according to Protective's own projections, the profit to be produced by the business taken over by Protective is projected to be sufficient to reduce the moratorium every year until it is eliminated in ten years or sooner. The result of this reduction in the moratorium is that if an insured cashes in his policy in the first year, he receives only 65% of cash surrender value (This amount was changed by the Second Amendment to 50%). If a man cashes in his policy in the second year, the policyholder gets less of a moratorium applied and accordingly receives more cash than the man who cashes in the first year and so on for ensuing years. The same applies to loans on policies. The tontine aspect was put in to create an incentive for people to

continue to pay premiums on their policies (S.F. 433). However, in practice, as Dr. Trosper explained, the tontine aspect penalizes those policyholders who take the cash value or loan value of their policies or permit their policies to lapse in early years and discriminates against policyholders who do the same thing in later years (S.F. 802-804). The fact that the tontine aspect induces a continuation of policies is no justification for persons who have paid the same premiums for the same contracts with Empire. Petitioners submit that this tontine aspect is contrary to both Texas and Alabama law.

The Texas Insurance Code Article 21.21 Section 4 provides in pertinent part as follows:

> UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED. — THE FOLLOWING ARE DEFINED AS UNFAIR METHODS OR COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN THE BUSINESS OF INSURANCE: . . .
> (7) UNFAIR DISCRIMINATION
>
> (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other terms and conditions of such contract . . .

Moreover, Article 21.21-A of the Texas Insurance Code provides in pertinent parts as follows:

> No insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and of equal expectation of life in the amount of the payment of premiums or rates charged

for policies of life or endowment insurance or dividends or other benefits payable thereon: . . .

The Alabama Insurance Code has a similar provision. Title 28A Section 237 of that Code provides as follows:

> LIFE INSURANCE, ANNUITIES AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION.—
>
> (1) no person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

The above provisions prohibit discrimination in the payment of policy benefits. However, the tontine aspect of the Reinsurance Agreement approved by the Trial Court below does just this. Though policyholders are entirely of the same class and may have the same expectation of life, under the Reinsurance Agreement, policyholders who decide to cash in their policies or who lapse in the early years are penalized, and much more than policyholders who do not. Petitioners submit that this aspect of the Reinsurance Agreement is unfair discrimination, prohibited by both Alabama and Texas law, and accordingly that the Court of Appeal's affirmation of the trial court's order was erroneous. *Order of Railway Conductors of America v. Quigley*, 131 Tex. 4, 111 S.W. 2d 698 (1938);

See also, State Life Insurance Company v. Strong, 127 Mich. 346, 86 N.W. 825 (1901); *Robinson v. Wolfe*, 27 Ind. App. 683, 62 N.E 74 (1901); *Equitable Life Assurance Society v. Commonwealth*, 113 Ky. 126, 67 S.W. 388 (1902).

V.

THE COURT OF CIVIL APPEALS DENIED THE PETITIONERS THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN IT HELD THAT THE ANCILLARY RECEIVERSHIP COURT HAD JURISDICTION TO APPROVE THE REINSURANCE AGREEMENT EVEN THOUGH THE SUIT BELOW WAS INITIATED WITHOUT THE DIRECTION, AUTHORIZATION, OR APPROVAL OF THE TEXAS STATE BOARD OF INSURANCE AS REQUIRED BY SECTION THIRTEEN OF ARTICLE 21.28 OF THE TEXAS INSURANCE CODE.

On April 5, 1972, the Commissioner of Insurance of the State of Texas by Order No. 36707 found without a hearing that Empire should be placed under supervision in Texas under Article 21.28-A of the Texas Insurance Code. However, on June 7, 1972, by Commissioner's Order No. 37251 the Commissioner of Insurance did not appoint a conservator under Article 21.28-A, Empire having represented that it would interpose no delay concerning the receivership proceedings initiated against Empire in Alabama. The State Board of Insurance took no official action concerning Empire at all (S.F. 266-272).

Nevertheless, on June 23, 1972, the State of Texas by the Attorney General of Texas "at the instance and the request of

the *Commissioner of Insurance* of the State of Texas," filed its original petition in this case against Empire Life Insurance Company of America asking that after a hearing a permanent receiver be appointed to take the possession of the affairs of Empire pursuant to *Article 21.28* of the Texas Insurance Code and pursuant to Subsection (a) of Section 12 of Article 21.49-1 of the Texas Insurance Code. The petition further alleged that Empire, a company domiciled in Alabama had been placed in receivership in Alabama and Plaintiff asked that "the receivership prayed hereinfore should be made ancillary to such Alabama receivership *in accordance with Section 13 of Article 21.28 of the Texas Insurance Code.*" (Emphasis added)

Section 13 of Article 21.28 of the Texas Insurance Code provides as follows:

> *Sec. 13. Ancillary Delinquency Proceedings.* Whenever under the laws of this State, a receiver is to be appointed in delinquency proceedings for an insurer domiciliary in another state, a court of competent jurisdiction in this State shall, *on the petition of the Board of Insurance Commissioners of this State*, appoint the liquidator herein provided as ancillary receiver in this State of such insurer. *The Board* shall file such petition (a) *if it finds* that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or (b) if ten (10) or more persons resident in this State, having claims against such insurer, file a petition or petitions in writing with the Board, requesting the appointment of such ancillary receiver. Such ancillary receiver shall have the right to sue for and reduce to possession the assets of such insurer in this State, and shall have the same powers and be subject to the same duties with respect to such assets, as are possessed by a receiver of a domiciliary insurer under the laws of this State. The remaining provisions of this Article shall be applicable to the conduct of such ancillary proceedings [Emphasis added].

Texas no longer has a Board of Insurance Commissioner's as referred to in Section 13, Article 21.28. However, under Article 1.02(b) of the Texas Insurance Code the State Board of Insurance in the State of Texas is the successor to all the powers, functions, authorities, prerogatives, duties, obligations and responsibilities previously vested in the Board of Insurance Commissioners. Article 1.02(b) and (c) of the Texas Insurance Code state as follows:

> (b) All of the powers, functions, authorities, prerogatives, duties, obligations and responsibilities, heretofore vested in devolving upon the Board of Insurance Commissioners as heretofore constituted under prior statutes; the Chairman of said Board; the Life Insurance Commissioner; the Fire Insurance Commissioner; and the Casualty Insurance Commissioner, shall hereafter be vested in the State Board of Insurance as a body, and except as provided herein, they shall be exercised, performed, carried out, and administered by the Commissioner of Insurance as the chief executive and administrative officer of the Board in accordance with the pertinent laws of this state and the rules and regulations for uniform application made by the Board and subject to supervision of the Board. The duties of the State Board of Insurance shall be primarily in a supervisory capacity and the carrying out and administering the details of the Insurance Code shall be primarily the duty and responsibility of the Commissioner of Insurance acting under the supervision of the Board.
>
> (c) Except as otherwise provided herein, all remaining references in the Insurance Code and other statutes of this state to "Board of Insurance Commissioners," "Board," or individual Commissioners shall

> mean the "State Board of Insurance" or the "Commissioner of Insurance," consistent with their respective duties and responsibilities under the terms and provisions of this amendatory Act.

These statutes are clear. It is the *State Board of Insurance* that must initiate ancillary receivership proceedings under Section 13 of Article 21.28, *not the Commissioner of Insurance.* In this case, however, it was the Commissioner of Insurance that initiated the ancillary receivership proceedings, not the State Board of Insurance. The Commissioner of Insurance is wholly without statutory authority to initiate such proceedings on his own. Yet, this is precisely what occurred.

The strange and unprecedented institution of this proceeding by the Attorney General of Texas was questioned by Judge Jones in the District Court below, but he failed and refused to direct that the proper statutory procedures be followed by the appropriate officials having the authority to place an insurance company in receivership. Accordingly, Empire was not treated the same as any other insurance company and was denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

When discussing why the application for a mandatory temporary injunction was commenced on application of the Attorney General, Judge Jones entered into the following colloquy on April 5, 1973, with Assistant Attorney General Rash:

> *I know from press reports that this thing is fraught with politics.* I don't want it in this court, if there is a "mad" on politically about this, I don't want it to be a part of this proceeding, and that is why I mention it. I have had the receiver file in many, many receiverships, a petition not of this nature, as I recall—I do not recall any for mandatory temporary injunction—but to recover assets of the receivership estate, and *this is the first one that I recall that was brought by the attorney general's office.* I may be mistaken. It is the first one I recall.

MR. RASH: If Your Honor please, *that is absolutely correct.* We have a new statute which I think adds great basis for this very type of action. Now, Your Honor, I will say right now it would suit me fine if the Court told us not to try to recover assets. As Your Honor knows, we frequently have very aggravated types of misapplication of company funds. *Now, it would be perfectly all right if we don't have any authority, if the Court holds that we don't have any authority to come before the Court with an urgent situation such as we think we have here.*

> THE COURT: Mr. Rash, you misunderstood me. I said I welcome any help. *But I want to make it abundantly clear that I am looking to the receiver appointed by the Court as the one to protect the receivership estate and to recover its funds.* Any assistance elsewhere is welcome, *but I cannot pass up this the apparent coincidence that in this case this procedure is followed, and why it is not a petition on behalf of the receiver.*
>
> Now, this is complicated somewhat by the fact—and I don't deplore this at all; I think it works excellently—that the receiver is in effect a State employee, the liquidator . . . [Emphasis supplied] [Hearing April 5, 1973, T.pp. 469, 470.]

Note that even the Attorney General's office questioned whether that office had authority to institute this action herein. The Court, rather than holding that it did not, begged the question and said that it was looking to the receiver to protect the

receivership estate. But the receiver has no authority to act in an action brought without authority.

When the Commissioner of Insurance of Texas took it upon himself to request the Attorney General to initiate ancillary receivership proceedings against Empire under Section 13 of Article 13 of Article 21.28, he was acting completely in excess of his authority, ultra vires and such acts are void and have no force and effect. Further, Empire was deprived of the equal protection of the laws by being the only insurance company put into receivership on application of the Attorney General rather than by the duly authorized authority.

Since the action taken by the Insurance Commissioner on his own was completely without authority and is void, the Trial Court was without jurisdiction to even consider a Reinsurance Agreement for Empire, much less approve one.

Of course Petitioners do not contend that the Attorney General of the State of Texas could not by himself bring quo warranto proceedings to forfeit a domiciled company's charter in Texas. *See John L. Hammond Life Insurance Company v. State*, 299 S.W. 2d 163 (Tex. Civ. App.—Austin 1957, writ ref'd. n. r. e.). But the Attorney General on his own or at the instance of the Commissioner of Insurance has no authority under Texas statutes to ask for an ancillary receivership or the cancellation of a certificate of authority of a foreign insurance corporation in Texas. Under Article 21.28 the exclusive authority to initiate such proceedings is given to the State Board of Insurance, *not* the Attorney General, *not* the Commissioner of Insurance and *not* the Attorney General acting for the Commissioner of Insurance.

That the proceeding for the cancellation of the certificate of authority in Texas and the appointment of a receiver in Texas must be initiated by the State Board of Insurance, rather than the Commissioner of Insurance, has been recognized by the courts of Texas in the case of *Lumbermen's Insurance Corporation v. State*, 364 S.W. 2d 429 (Tex. Civ. App.—Austin 1963, writ ref. n.r.e.). Though that case dealt with the appointment of a receiver for a company domiciled in Texas under Section 2(a) of Article 21.28 of the Texas Insurance Code, the court recognized that under both that section and Section 13 the action must be initiated by the State Board of Insurance, not the Commissioner of Insurance:

> The Texas Insurance Code empowers the Court to appoint the statutory liquidator as receiver to take charge of the assets of the company and proceed with the company as the court may direct . . . . The action of the attorney general in behalf of the Board of Insurance was correct. . . .

The dangers of such circumvention of Section 13 of Article 21.28 by the Commissioner in initiating ancillary receivership proceedings become more apparent when viewed in the Commissioner's absence of authority to initiate actions against domestic insurance companies. Article 1.19 of the Texas Insurance Code mandates that only the State Board of Insurance has the power to initiate or maintain actions affecting the business of domestic insurance companies. Article 1.19 states that:

> The Board shall have the power to institute the suits and prosecution either by the Attorney General or such other attorneys as the Attorney General may designate for any violation of the law this state relating to insurance. No action shall be brought or maintained by any

person other than the Board by closing up the affairs or to enjoin, restrain or interfere with the prosecution company organized under the law of this State.

The absence of the ability of the Commissioner of the State of Texas to initiate such proceedings was confirmed in *Adler v. Brooks*, 375 S.W. 2d 544 (Tex. Civ. App.—Tyler 1964, ref n.r.e.). To permit the Commissioner to initiate the receivership proceedings under Section 13 of Article 21.28 while the Commissioner is not allowed to seek relief under Article 1.19 would totally contradict the statutes and clear legislative intent.

Though prior to the initiation of these proceedings Empire was placed in supervision by the Texas Commissioner of Insurance in an order of April 5, 1972, the proceedings below were not initiated under Article 21.28-A. The fact that the proceedings before the Texas Ancillary receivership court are not under Article 21.28-A is evidenced both by the fact that the Texas Attorney General's Petition alleges in at least two places that the proceedings are under Article 21.28 of the Texas Insurance Code, but also by the fact that the procedures followed below are not the procedures required in Article 21.28-A.

Under Article 21.28-A the Commissioner of Insurance is authorized to request the Attorney General to file a quo warranto suit only after (1) notice, (2) a hearing and (3) a finding by the Commissioner that the insurance company has failed to comply with the lawful requirements of the Commissioner. In this case this was never done. Instead, the Insurance Commissioner decided to wait for the Alabama court to act to appoint a receiver, and when that Court did act on June 22, the Commissioner of Insurance, not the State Board of Insurance, requested the Attorney General to file the present action.

Further, the holding of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas in *Day v. State*, 489 S.W. 2d 368 (Tex. Civ. App.—Austin 1972, writ ref. n.r.e.) is not res judicata of the issues raised by the Petitioners. In *Day* the court's holding that the Commissioner of Insurance has the independent authority to seek the "receivership and liquidation" of an insurer was based upon Article 21.28-A of the Texas Insurance Code and not upon Article 21.28, Section 13, the section upon which the present Texas ancillary receivership proceeding is based. In addition, the Court's holding in *Day* that the Attorney General has the independent authority to initiate quo warranto proceedings to forfeit a corporation's charter and the authority cited by it in support thereof are not res judicata of the issue raised by the Petitioners, whether the Attorney General has the independent authority under Texas law to ask for an ancillary receivership of a foreign insurance corporation doing business in Texas. Under Article 21.28 the exclusive authority to initiate such proceedings is given to the State Board of Insurance *not* the Commissioner of Insurance and *not* the Attorney General acting for the Commissioner of Insurance.

In summary, since this proceeding was brought under Article 21.28 of the Texas Insurance Code and since Section 13 of Article 21.28 requires that the proceedings be brought upon the instance of the Texas State Board of Insurance, and not the Texas Commissioner of Insurance, the acts of the Texas Insurance Commissioner here are wholly without authority, and accordingly are void. The Court of Civil Appeals failure to so hold clearly denied the Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment.

CONCLUSION

For the reasons stated, the Petitioners pray that their Petition for a Writ of Certiorari to the Court of Civil Appeals for Tenth Supreme Judicial District of Texas be granted.

Respectfully submitted,

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PROOF OF SERVICE

Proof of service of three copies of Petitioners' Petition for a Writ of Certiorari and Appendix upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

ADDENDUM

INTER-OFFICE COMMUNICATION

Attorney General's Office

DATE: April 19, 1974.

TO: File AG72-888

FROM: Ralph Rash

SUBJECT: Empire Life

On April 18, 1974, I received an emergency call from Tom McFarling, Deputy Commissioner of Insurance, formerly Liquidator of the State Board of Insurance, saying that a crucial and urgent matter had arisen in the Empire case. I rushed to the State Board of Insurance and had a conference with Tom, Herb Crook, the present Liquidator, Bob Clines, and others, and later in the day, we conferred with the Commissioner and the Board.

Herb Crook had just returned from Alabama where, he stated, the Judge of the State court (Judge Barber) had announced his inclination to appoint "an administrator" for Empire Life for the sole purpose of rehabilitating the company, who would take possession of all of the assets of the company, including those in Texas, and administer the company from Alabama.

This alarmed everyone. In order for you to understand the significance of this matter, I will give you a brief history of the case.

In the early part of 1972, as the result of the investigation by our office of another matter, we learned that the recently filed

examination report of Empire Life revealed that the company was insolvent by approximately $14 Million Dollars. It further developed that the company had not been examined for five years, even though the law requires that insurance companies be examined at least every three years. The company technically had its domicile in Alabama, which had provided a very favorable climate in previous years for the operation of crooked insurance companies. Commissioner Cotten was agreeable to the filing of a suit in Texas to place the company in receivership, but he wanted to wait until Alabama appointed a receiver, so that we could appoint an ancillary receiver. Getting the Alabama court to proceed with the appointment of a receiver was like mining granite, and it took until about June 22, 1972, for Judge Barber to finally act.

In the meantime, it became apparent that the de facto domicile of Empire was in Dallas, where they maintain their principal offices and every operation of the company was headquartered there. Most of the policyholders and most of the assets were in Texas and very little business of the company was conducted in Alabama. Several states had a considerable number of policyholders. About a month prior to the action of the Alabama court, the company was placed in receivership by the Arkansas court, where the company has considerable business, but we could not persuade Clay Cotten to go ahead with a receivership in this state. We felt that to permit the Alabama authorities to have charge of the affairs of the company would be like permitting the "tail to wag the dog", and we knew that in this case the "tail" was very corrupt. Let me hasten to add that Commissioner Bookout of Alabama impressed all of us as being a fine and honest man, and none of us have had occasion to doubt his

integrity at any time. However, he had considerable reservations about Judge Barber.

At the hearing conducted before Judge Barber last week, the Commissioners of Alabama, Texas, Arkansas and all of the other states in which the company did business were trying to convince the court that he should approve a plan for the reinsurance of the company's business, which they had unanimously worked out. Herb Crook reported that the lawyer for Commissioner Bookout put on a "beautiful" case and, without a word of evidence to support the action, the court called a conference in chambers where he announced his idea of appointing a crony of his, Paul Carr, to take over the company as its "administrator". This is foreign to law, and is in the very teeth of the statutory and case law on the matter. Commissioner Bookout plans to appeal from such an order, if it is entered. Judge Barber told the parties to return for further proceedings next Monday, and it is anticipated that he will announce his decision at that time.

The emergency arises by reason of the fact that if Judge Barber dissolves the domiciliary receivership, it might have the effect of terminating or at least impairing our ancillary receivership, and I revived my original theory of the case that Texas should have filed the case here on the ground that the de facto domicile of the company was in Texas. However, I stated that I thought it was probably too late and that we would not be in a strong position to urge such theory.

As our conference progressed, it became more and more apparent that the others present, especially Herb Crook, took great stock in the idea of reviving the de facto domicile theory,

and all of us commenced a search of our prior briefs on the subject. I found mine and relayed them to Herb Crook.

My tentative conclusion is that under the authorities which I included in a brief which I submitted to Tom McFarling several months ago, the Texas statutes and cases simply do not permit any one to remove the assets of this corporation from the state until the Texas creditors and policyholders have been satisfied. Therefore, at this point, I do not feel that it is necessary to amend our pleadings so as to ask Judge Jones to convert the ancillary receivership into a domiciliary receivership, *but* this may become necessary. I do not think we would be jeopardizing our position by waiting to see what Judge Barber does, because any order of the Alabama court attempting to remove the statutory receiver would be appealed from and would not be final for quite some time, and we would have ample time to reconsider our basic pleadings in the matter. In other words, the Alabama court could not possibly enforce its orders within the State of Texas, and if he does not back down from his ridiculous notion of appointing an "administrator", we can deal with the problem before his order becomes final.

Herb Crook, as the court's receiver, contacted Judge Jones and apprised him of the situation in Alabama, but Judge Jones did not have any proposal as to what should be done at this time.